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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAMANTHA KIRBY, individually and on behalf of all others similarly situated,

Plaintiff,

v.

MCAFEE, INC., a Delaware corporation headquartered in California,

Defendant.

Case No. 5:14-cv-02475-EJD

JOINT CASE MANAGEMENT STATEMENT AND RULE 26(f) REPORT

Date:
Time: 10:00 a.m.
Courtroom:

Action Filed: May 29, 2014
Trial date: None set

Hon. Edward J. Davila, presiding

I. INTRODUCTION

Plaintiff Samantha Kirby ("Plaintiff") and Defendant McAfee Inc. ("McAfee") respectfully submit this Joint Case Management Statement and Discovery Plan pursuant to Federal Rules of Civil Procedure 26(f) and 16(b), Civil L. R. 16-10, and the Standing Order for All Judges of the Northern District of California.

II. JURISDICTION AND SERVICE

Plaintiff contends that this Court has subject matter jurisdiction over this proposed class action, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1332(d). McAfee does not contest personal jurisdiction. McAfee has been served.

III. FACTS

A. Plaintiff's Contentions:

Plaintiff, on behalf of herself and all others similarly situated, alleges that Defendant McAfee was involved in the following unlawful and unfair practices: (1) auto-renewing consumer subscriptions for its McAfee antivirus software without getting its customers' affirmative consent to auto renew its antivirus software at the higher renewal rate (by disclosing the actual renewal price), which is sometimes 60% higher than the initial sign up price; (2) charging prices upon auto-renewal that are higher than those originally charged to first time subscribers, without clear and conspicuous notice to the consumers that the auto renewal rate is always higher than the initial sign up rate or manual sign-up renewal rate; (3) auto-renewing consumer subscriptions for its McAfee antivirus software (when McAfee's customers have not provided current or updated credit/debit card information) by obtaining new credit/debit card information from the credit/debit card companies and then charging auto-renewal fees without consumers' consent to the antivirus software renewal or to use their new credit card information.

B. Defendant's Contentions:

Plaintiff's statement of facts ignores (1) that Plaintiff entered into an agreement (the End User License Agreement or EULA) with McAfee that plainly provided for automatic renewal of her subscription, while affording her the right at any time to opt out of that automatic renewal; (2) the many other disclosures regarding auto-renewal that were afforded to her before she purchased her subscription; (3) that her agreement with McAfee provided plainly that while she received a discount for her initial subscription, her auto-renewal would be processed at a charge no greater than McAfee's then-current price "excluding promotional and discount pricing"; (4) that (as was disclosed in the EULA) she received an email notification in advance of her auto-renewal, informing her of her upcoming auto-renewal, disclosing the exact price that she would be charged for that auto-renewal, and notifying her both of the option of manual renewal rather than auto-renewal and of her right to a full refund up to sixty days after she was charged if she did not want to renew; and (5) that she agreed that as long as she participated in auto-renewal, she had an obligation under the EULA to keep her account information updated; based on the allegations in the Complaint, she apparently may have done so through a separate agreement with her card issuing bank that provided for her consent to routine card updating programs operated in connection with subscription-based services.

IV. LEGAL ISSUES

A. Plaintiff's Contentions:

Based on her allegations concerning Defendant McAfee was involved in the following unlawful and unfair practices related to auto-renewing consumers' subscription for its antivirus software, Plaintiff asserts claims for: (1) Violation of the California Consumers Legal Remedies Act, Cal. Civ. Code § 1750, et seq.; (2) Violations of the California Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq.; (3) Violations of the California Automatic Renewal Law, Cal. Bus. & Prof. Code §§ 17600 - 17604; (4) Common Law Money Had and Received; and (5) Unjust Enrichment.

Plaintiff will seek certification of the Class pursuant to Federal Rule of Civil Procedure 23(b)(3) and/or (b)(2), and will seek to be appointed Class Representative and to have her counsel appointed Class Counsel.

B. Defendant's Contentions:

McAfee intends to file a motion to dismiss all counts of the complaint with prejudice. In the event the motion is denied in whole or in part, McAfee intends to demonstrate that Plaintiff is entitled to no relief, and that Plaintiff cannot represent other persons in this action.

V. MOTIONS

A. Motion to Dismiss

McAfee intends to file a motion to dismiss all counts of the complaint with prejudice.

B. Motion to Certify

Plaintiff anticipates filing a motion to certify the putative Classes, and has proposed a schedule below. McAfee will oppose the motion for class certification.

C. Motion for Summary Judgment

Should the Court deny McAfee's motion to dismiss, McAfee intends to move for summary judgment; other motions (such as discovery motion practice, Daubert motions, etc.) are possible depending on developments of this matter.

VI. AMENDMENT OF PLEADINGS

Depending on information to be revealed through initial disclosures and discovery, Plaintiff believes additional amendments may be required. Plaintiff and absent members of the Class reserve certain rights relating to the addition and substitution of class representatives.

Plaintiff's counsel will confer with counsel in the related case of *Williamson v. McAfee, Inc.*, 5:14-cv-00158-EJD about filing a consolidated complaint.

McAfee reserves all rights to oppose any proposed amendment.

VII. EVIDENCE PRESERVATION

Plaintiff's counsel has sent a preservation notice to Samantha Kirby.

McAfee has taken appropriate steps to preserve evidence.

The parties have reviewed the ESI Guidelines and Checklist, and complied with all requirements. The parties have met and conferred pursuant to Rule 26(f) and the ESI Guidelines and Checklist regarding steps to preserve potentially relevant evidence.

VIII. DISCLOSURES

The parties will exchange initial disclosures on or before July 25, 2014.

IX. DISCOVERY

A. The Anticipated Scope of Discovery

The parties agree to prioritize discovery for the anticipated class certification motion. The parties will work together in good-faith to determine which documents will be needed for the class certification motion, and will first focus the discovery efforts on issues relevant to class certification.

The parties also agreed not to bifurcate merit-based discovery on the underlying claims and discovery as it relates to the elements of Federal Rule of Civil Procedure 23 and whether a class may be properly certified.

McAfee submits that discovery should not commence until and unless warranted following resolution of its potentially dispositive motion to dismiss the Complaint in its entirety. Plaintiff contends discovery should not be delayed.

B. Electronically Stored Information

Plaintiff's Position:

Plaintiff plans to request that Defendant McAfee provide the ESI-related information referred to in Rule 26(f), the Court's Checklist for Rule 26(f) Meet and Confer Regarding Electronically Stored Information, and ESI Guideline 2.02, including the following general information: (1) a description of systems in which potentially discoverable information is stored; (2) a list of potentially relevant witnesses and ESI custodians, including each person's name, job title(s), description of job role(s), time period during which the person held the job title(s), current employer, and if not currently employed by Defendant, the person's current contact information if known; and (3) any code words, nicknames and shorthand reference for relevant issues or facts in the case reasonably needed to develop appropriate keywords or phrases for culling ESI. This information is useful and necessary to develop an appropriate plan for the production of ESI, and may enable the Parties to prioritize the production of ESI given the importance of specific subsets relative to the stage of litigation and the burden of production.

Defendant's Position:

McAfee anticipates that discovery in this matter will predominantly come from McAfee, and will work in good faith with Plaintiff to determine the reasonable and proportionate scope of such discovery consistent with the federal rules, the local rules, and the local discovery guidelines. McAfee anticipates deposing Plaintiff regarding, *inter alia*, the facts and circumstances of her subscriptions to McAfee software and her purported adequacy as a representative of the putative classes. McAfee reserves the right to seek additional discovery.

C. Privilege Issues

The parties anticipate they will agree upon and submit to the court a proposed stipulated protective order that will apply to confidential information produced in discovery.

D. Changes to the Limitations on Discovery Imposed by the Federal Rules of Civil Procedure

Without prejudice to its ability to seek leave from applicable rules, at this stage Plaintiff does not request changes to the limitations on discovery imposed under the federal or local rules.

McAfee does not seek to limit the numbers of interrogatories or depositions beyond the presumptive limitations in the federal and local rules. McAfee will cooperate with Plaintiff in good faith on all discovery issues but reserves the right to seek limitations on discovery consistent with the principles in the federal and local rules, should such limitations be warranted.

X. CLASS ACTIONS

The parties propose that, consistent with the position taken by all parties in the related case *Williamson v. McAfee, Inc.*, N.D. Cal. Case No. 5:14-CV-00158-EJD, a schedule for class certification should be set following resolution of McAfee's contemplated motion to dismiss in this case.

XI. RELATED CASES

A related case entitled *Williamson v. McAfee, Inc.*, 5:14-CV-00158-EJD is pending in the Northern District of California. On July 1, 2014, this case was related to the *Williamson* case and transferred to this Court.

XII. RELIEF

Plaintiff seeks the following relief through the complaint: (a) an order certifying this case as a class action and appointing Plaintiff and her counsel to represent the Class; (b) equitable monetary relief including individual restitution to Plaintiff and each member of the Class; (c) actual, statutory, and punitive damages; (d) an order requiring Defendant to immediately cease its wrongful conduct and to remedy that conduct, including by way of a corrective advertising campaign; (e) reasonable attorneys' fees and the costs of this action; (f) statutory pre-judgment interest; and (g) such other relief as this Court may deem just and proper. The computation of restitution or damages cannot be determined until the information is obtained from Defendant and possibly third parties.

McAfee believes that Plaintiff is entitled to no relief. McAfee also believes that Plaintiff cannot proceed as a representative of others.

XIII. SETTLEMENT AND ADR

The parties have agreed to pursue private mediation by December 5, 2014 (Docket No. 21).

XIV. CONSENT TO MAGISTRATE JUDGE FOR ALL PURPOSES

This case originally was assigned to Magistrate Judge Howard R. Lloyd, and was reassigned to this Court in an Order relating this case to the previously filed *Williamson v. McAfee, Inc.*, 5:14-CV-00158-EJD.

XV. OTHER REFERENCES

The parties agree that this case is not suitable for reference to binding arbitration or a special master.

XVI. NARROWING OF ISSUES

After adequate discovery has been conducted, including concerning issues related to class certification, the parties will be in a better position to determine, if necessary, whether issues can be narrowed by agreement or by other motion.

XVII. EXPEDITED SCHEDULE

The parties do not believe an expedited schedule is appropriate for this case.

XVIII. SCHEDULING

As noted above, the parties propose that, consistent with the position taken by all parties in *Williamson*, a schedule for class certification should be set following resolution of McAfee's contemplated motion to dismiss in this case.

McAfee notes that any proposed amendment of the complaint also could affect the schedule for this case. In the event the Court does not grant McAfee's motion to dismiss all counts of the Complaint with prejudice, McAfee will work cooperatively with Plaintiff on a reasonable scope of discovery, and proposes that the Court set briefing on class certification for nine months after McAfee files an answer. McAfee submits that discovery should not commence until and unless warranted following resolution of its potentially dispositive motion to dismiss.

Plaintiff maintains that discovery should proceed in accordance with the Federal Rules of Civil Procedure, and notes that the effective stay on discovery requested by Defendant will only further delay the class certification schedule and eventual resolution of this matter. There is no reason basic written discovery cannot proceed now.

XIX. TRIAL

Plaintiff has demanded a jury trial on her claims that are triable by a jury. Plaintiff expects trial may last two weeks. McAfee believes that it is premature to estimate the length of trial at this time.

XX. DISCLOSURE OF NON-PARTY INTERESTED ENTITIES OR PERSONS

McAfee filed a Certification of Interested Entities on June 11, 2014. At this time, Plaintiff knows of no such interested entity or persons other than the named Parties in this action and in Defendant's certification.

Respectfully submitted,

Dated: July 25, 2014

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ATTESTATION OF FILER

I, Theodore Maya, attest that concurrence in the filing of this document has been obtained from each of the other Signatories, which shall serve in lieu of their signatures on the document. Signed this 25th day of July, 2014.

/s/ Theodore Maya
Theodore Maya